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Recommended citation(APA):
Australian Discrimination Law Experts Group , Elphick, L., & Taylor, A. (2020, Jan 30). Submission by the Australian Discrimination Law Experts Group to the Commonwealth Attorney-General's Department on the Religious Discrimination Bill 2019 Second Exposure Draft. Attorney-General's Department. https://www.ag.gov.au/sites/default/files/2020-05/AustralianDiscriminationLawExpertsGroup.DOCX

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Download date: 05 May 2023

Submission by the Australian Discrimination Law Experts Group

to the Commonwealth Attorney-General's Department

Religious Discrimination Bill 2019 (Cth) Second Exposure Draft

30 January 2020

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1. Australian Discrimination Law Experts Group

We make this submission on behalf of the undersigned members of the Australian Discrimination Law Experts Group (**ADLEG**), a group of legal academics with significant experience and expertise in discrimination and equality law and policy. This submission focuses primarily on the second exposure draft of the Religious Discrimination Bill 2019 (Cth). A summary of key changes from the submission made by the Australian Discrimination Law Experts Group on the first exposure draft of the Religious Discrimination Bill 2019 (Cth), dated 1 October 2019, can be found on pages 4 to 8.

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by emailing liam.elphick@uwa.edu.au.

This submission was coordinated and authored by:
Liam Elphick, University of Melbourne; University of Western Australia
Alice Taylor, Bond University

Written contributions were provided by:
Robin Banks, University of Tasmania
Associate Professor Alysia Blackham, University of Melbourne
Professor Beth Gaze, University of Melbourne
Dr Sarah Moulds, University of South Australia
Professor Simon Rice, University of Sydney
Associate Professor Belinda Smith, University of Sydney
Professor Margaret Thornton, Professor Emerita, Australian National University

This submission is endorsed by:
Robin Banks, University of Tasmania
Associate Professor Alysia Blackham, University of Melbourne
Liam Elphick, University of Melbourne; University of Western Australia
Professor Beth Gaze, University of Melbourne
Professor Beth Goldblatt, University of Technology Sydney
Rosemary Kayess, University of New South Wales
Dr Sarah Moulds, University of South Australia
Associate Professor Karen O'Connell, University of Technology Sydney
Professor Simon Rice, University of Sydney
Associate Professor Belinda Smith, University of Sydney
Bill Swannie, Victoria University
Alice Taylor, Bond University
Professor Margaret Thornton, Professor Emerita, Australian National University

2. Summary

As set out in further detail below, our recommendations are as follows (all clauses refer to the second exposure draft of the Religious Discrimination Bill 2019 (Cth)):

2.1 'STATEMENT OF BELIEF' CLAUSES

Recommendation 1: Clause 42 be removed.

2.2 INDIRECT DISCRIMINATION CLAUSES

Recommendation 2: Clauses 8(2)(d), (2)(e), (3), (4) and (5) and 32(6) (*employer conduct rule and qualifying body rule*) be removed.

Recommendation 3: Clauses 8(6) and (7) and 32(7) (*health practitioner conduct rule*) be removed.

2.3 RELIGIOUS BODY EXCEPTION CLAUSES

Recommendation 4: Clause 11(1) be amended to read: 'A religious body does not *discriminate* against a person under this Act by engaging, in good faith, in conduct that *conforms to the doctrines, tenets, beliefs or teachings of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion*.'

Recommendation 5: Clause 11(3) be removed.

Recommendation 6: Clauses 11(5)(b) and (c) be removed, and replaced with: 'any other body established for religious purposes (other than a body that engages solely or primarily in commercial activities)'.

Recommendation 7: Clause 11(6) be removed, and replaced with: 'Nothing in this section affects the operation of section 19(2) of this Act.'

Recommendation 8: Clauses 32(8) and (10) be removed; in the alternative, clauses 32(8) and (10) be amended to meet the test found in Recommendation 4.

Recommendation 9: Clauses 33(2) and (4) be removed; in the alternative, clauses 33(2) and (4) be amended to meet the test found in Recommendation 4.

2.4 OTHER MATTERS

Recommendation 10: A definition of 'aggrieved person' be added to clause 5 to mean natural persons, and clauses 7 and 8 (*substantive prohibition clauses*) be amended to read: 'A person *discriminates* against another person (*'aggrieved person'*)…'.

Recommendation 11: 'Association' be defined in clause 5 in identical language to the definition of 'associate' found in section 4(1) of the *Disability Discrimination Act 1992* (Cth), and the phrase '(whether as a near relative or otherwise)' be removed from clause 9.

Recommendation 12: Clause 9 (*discrimination against associates*) be amended to read: 'This Act applies to a person ('*aggrieved person*') who has an association with a person…'.

Recommendation 13: The *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth) be amended to include similar protection for associates as per the test found in Recommendation 11.

Recommendation 14: Further time be allowed, and proper process adopted, for consultation on the Religious Discrimination Bill 2019 (Cth) and the related religious freedom Bills to allow fair and non-discriminatory participation.

Recommendation 15: Clause 3(2) (*objects clause*) be removed, and the objects clauses of the four existing federal discrimination laws *not* be amended to include reference to all human rights having equal status under international law.

Recommendation 16: Clauses 11(2) and (4), 32(9) and (11), and 33(3) and (5) (*preferencing of religious bodies*) be removed.

Recommendation 17: Clause 5(2) (*overriding council by-laws*) be removed.

Recommendation 18: Legislative notes and examples that make substantive legal comments and clarifications be converted into substantive provisions in the Bill.

Table 1: A summary of key changes from the original submission made by the Australian Discrimination Law Experts Group on the first exposure draft of the Religious Discrimination Bill 2019 (Cth), dated 1 October 2019:

Clause	Change in second exposure draft	ADLEG submission part below	ADLEG response
3(2)	Adds reference to 'equal status' of all human rights in international law to the 'objects' clause of the Bill (and associated amendments made to the objects clauses of the four existing federal discrimination laws)	7.4	This will cause confusion in statutory interpretation, as international law makes clear that the right to manifest religion *can* be limited in order to secure the rights of others. Amendment of the 'objects' clauses of the four existing federal discrimination laws should not be accomplished by a secondary piece of legislation in this way.
5(1)	Removes the definition of 'person' which included bodies corporate	7.1	Owing to the *Acts Interpretation Act 1901* (Cth), 'person' under this Bill still includes bodies corporate and other organisations; such bodies should not be permitted to themselves bring discrimination claims, as human rights are expressly designed to protect innately *human* characteristics.
5(1)	Narrows the definition of 'health services'	5.2	The definition of 'health services' still includes the vast majority of essential health services in Australia. This gives an unprincipled privilege to health practitioners to refuse to provide health services on the basis of one protected attribute (religious belief or activity) over all others.
5(2)	Adds an explicit override of local government by-laws where they prohibit religious activity	7.6	This privileges one protected attribute (religious belief or activity) over all others by providing that local government by-laws can be overridden where they restrict religious belief or activity even where all other individuals and groups must comply with them.

Clause	Change in second exposure draft	ADLEG submission part below	ADLEG response
8(3)	Broadens the scope of permissible employer conduct rules to 'the course of the employee's employment'	5.1	This slightly narrows the operation of clauses 8(4) and (5). However, employer conduct rules should instead be considered under the same 'reasonableness' test as applies under all federal discrimination laws, rather than providing unique protection to employees who express religious views.
8(4)	Extends the presumption of unreasonableness in an indirect discrimination claim to qualifying body conduct rules	5.1	Qualifying body conduct rules should be considered under the same 'reasonableness' test as applies under

Clause	Change in second exposure draft	ADLEG submission part below	ADLEG response
11(1), (3)	Lowers the standard of the religious body exception test to only require that one individual 'could reasonably consider' the conduct to be in accordance with religious beliefs; and includes a 'religious susceptibility' test in the alternative	6.1	These provisions adopt tests with much lower standards than equivalent religious body exceptions found in other Australian discrimination laws. They except almost all conduct by all religious bodies from the operation of the Bill, thereby significantly undermining and frustrating its purpose (to prohibit religious discrimination).
11(1), (3)	Clarifies that these subsections do not permit conduct that is otherwise unlawful under any other federal law, including the *Sex Discrimination Act 1984* (Cth)	6.3	This partially rectifies concerns raised that clause 11(5)(a) could be used to exclude LGBTIQ+ students from religious schools. Further steps should be taken to ensure this Bill does not confer any separate right on religious schools to discriminate against or exclude students on the basis of sexual orientation and/or gender identity.
11(2), (4); 32(9), (11)	Clarifies that the Bill permits the giving of preference to persons of the same religion as the religious body	7.5	This is unnecessary and potentially confusing. Clause 11 already permits the giving of preference to persons of the same religion as the religious body.
11(5)	Expands the definition of 'religious body' to include public benevolent institutions, even where they engage solely or primarily in commercial activities	6.2	There is no principled basis for why institutions with only a religious affiliation or connection, and which are responsible for providing a vast array of public goods and services, should be able to discriminate in the provision of such goods and services.

Clause	Change in second exposure draft	ADLEG submission part below	ADLEG response
32(8), (10)	Adds a new exception for religious hospitals, aged-care facilities and accommodation providers in relation to employment	6.4	This test is very easy to satisfy, and there is no principled basis for why doctors, aged-care providers and others must have the same religious beliefs as the religion associated with the organisation. Where religious beliefs *are* relevant to a particular role, they will already be covered by the inherent requirements exception; where they are not relevant, any further exception would be an unwarranted limitation on freedom of speech, opinion and belief.
33(2), (4)	Adds a new exception for religious camps and conference sites in relation to accommodation	6.5	The test is very easy to satisfy, and there is no principled basis for why those attending for-profit camps and conference sites must have the same religious beliefs as the religion associated with the camp or conference site. This exception is an unwarranted limitation on freedom of speech, opinion and belief.
42 (and 5(1))	Includes a definition of 'vilify'	4.1	The definition of 'vilify' is far narrower than that in other discrimination laws. This means the exception in clause 42(2) is narrow and that the operation of clause 42(1) in overriding existing federal, state and territory laws is now even wider, further entrenching an objectionable hierarchy in discrimination protection in Australia.
42	Clarifies that only a statement 'in and of itself' will override other discrimination laws	4.1	This does not adequately address previous concerns that acts of discrimination connected to discriminatory statements could be considered together and rendered lawful by clause 42. The explanatory notes are not substantive law, and it remains open for a party to argue for an interpretation of 'statement' that encompasses conduct.

Clause	Change in second exposure draft	ADLEG submission part below	ADLEG response
Legislative notes and examples	Adds a wide array of legislative notes and examples throughout the Bill	7.7	The wide use of legislative notes and examples to make substantive legal clarifications is inappropriate; this drafting renders the Bill more complex and confusing, and legislative notes do not have the same weight in interpreting statutes as do substantive provisions

3. Introduction

We support the prohibition of religious discrimination at the federal level through the introduction of 'shield'-like protections to mirror existing federal protections for race, sex, disability and age. However, as noted in our original submission dated 1 October 2019, the first exposure draft of the Religious Discrimination Bill 2019 (Cth) went far beyond what was necessary to do this. This is also the case for the second exposure draft of the Religious Discrimination Bill 2019 (Cth) (**the Bill**), which retains the same key problems as the first exposure draft, and has introduced elements that raise new concerns and complications, notwithstanding some minor improvements.

The Bill is deeply flawed as it privileges and prioritises religious belief and activity over other protected attributes, and overrides existing protections for women, LGBTIQ+ people, and other impacted groups. In doing so, it grants positive rights to individuals to harm others through 'sword'-like provisions. Further, in according rights to religious and corporate entities, the Bill also deviates from the *International Covenant on Civil and Political Rights* (**ICCPR**), which is explicitly relied upon as a constitutional basis for the Bill in clause 58(a); the ICCPR, like other international human rights instruments, accord rights only to natural persons.

The key concerns raised in our original submission on the first exposure draft of this Bill have not been adequately addressed, and in some cases have been exacerbated, while new concerns have now been raised by the changes made in the second exposure draft of this Bill. We are therefore unable to support the Bill in its present form. We propose several amendments to ensure the Bill aligns more closely with the standard structure and content of existing federal discrimination laws, and the removal of provisions that undermine existing discrimination law protections for other groups.

4. The right to make statements of belief: Clause 42

4.1 SUBSTANTIVE OVERRIDE OF OTHER FEDERAL, STATE AND TERRITORY LAWS

Clause 42(1)(a) of the Bill provides that 'statements of belief' cannot be the subject of *any* discrimination claim under *any* Australian discrimination laws, whether at federal, state or territory level. Clause 42(1)(b) provides that 'statements of belief' cannot be the subject of a claim under section 17(1) of the *Anti-Discrimination Act 1998* (Tas), which prohibits vilification. There are five main problems with clause 42.

Firstly, while each of the four existing federal discrimination laws contain their own exceptions in regard to their own respective prohibited conduct, none of those laws purport to provide exceptions or defences to *the other federal discrimination laws.* Each is self-contained; for instance, the *Sex Discrimination Act 1984* (Cth) (**SDA**) does not purport to override any provision of the *Disability Discrimination Act 1992* (Cth) (**DDA**). This Bill departs from this existing practice by explicitly overriding the other four federal discrimination laws where a person makes a statement of belief that would otherwise be unlawful discrimination under one (or more) of those four federal laws. This gives an unprincipled privilege to one protected attribute (religious belief or activity) over all others, and creates an objectionable hierarchy in discrimination protection in Australia.

Second, clause 42 is the only example of a current provision in an Australian federal discrimination law explicitly overriding *state and territory discrimination laws* in order to weaken their effect. Australia's legislative framework is designed to create two concurrent systems of discrimination law—federal, and state/territory—that can operate alongside each other. This is reflected in provisions made in every federal discrimination law explicitly stating that they do not exclude or limit the operation of state or territory laws that are capable of operating concurrently.[1] The existing four federal discrimination laws do *not* interfere with state and territory discrimination laws.[2] This Bill differs by providing a sword to perpetrators of discriminatory statements to wield, thereby carving out, overriding and removing some of the protection afforded by state and territory discrimination laws.

There has long been bipartisan consensus to maintain these complementary and concurrent federal and state/territory discrimination law systems. This approach allows claimants to pursue appropriate causes of action, including having the benefit of choosing proceedings in jurisdictions where the awarding of legal costs are the exception (as is the case in state/territory discrimination cases) rather than the rule (as is the case in federal discrimination cases). Once an

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1 *Racial Discrimination Act 1975* (Cth) s 6A(1); *Sex Discrimination Act 1984* (Cth) s 10(3); *Disability Discrimination Act 1992* (Cth) s 13(3); *Age Discrimination Act 2004* (Cth) s 12(3).

2 The sole exception is that federal disability standards prescribed under the *Disability Discrimination Act 1992* (Cth) are considered to also apply to state and territory discrimination laws unless a contrary intention is expressed in the particular standard: see *Disability Discrimination Act 1992* (Cth) ss 13(3A), 31–34. However, this reflects the unique and important status of disability standards in disability discrimination law, and this only serves to *increase* protection at state and territory level. By contrast, clause 42 of the Religious Discrimination Bill 2019 (Cth) only serves to *decrease* protection at state and territory level.

action is pursued, the laws of that jurisdiction apply without regard to the laws of the concurrent jurisdiction; eg, a claim pursued through the relevant Victorian agency or tribunal under Victorian discrimination legislation will not be subject to federal discrimination legislation or jurisprudence. These concurrent systems also allow states and territories to pass laws that reflect their own values and principles and the needs of their communities. This balance between federal legislation, on the one hand, and state and territory legislation, on the other hand, would be thrown into disarray by clause 42.

Third, 'statement of belief' is defined so widely that clause 42 would have wide-ranging consequences in limiting liability for discrimination, vilification, and derogatory comments targeting other people on the basis of their protected attributes. Clause 5(1) requires only that a statement be made 'in good faith' and that a person 'could reasonably consider' it to be in accordance with religious beliefs. This would allow a vast array of statements to be captured by clause 42.

For instance, it is currently unlawful for a person in Tasmania to use a racial epithet or slur to offend, ridicule, insult, intimidate or humiliate another person on the basis of their race. Under clause 42, this behaviour would become lawful, but only for those who do so on the basis of a religious belief.[3] Where such behaviour occurs on the basis of any other belief unrelated to religion, it remains unlawful, reinforcing the unprincipled privilege the Bill would give to one protected attribute over all others.

The explanatory notes to the second exposure draft of the Bill provide guidance as to where the drafters believe that this provision would and would not apply:

> For example, a statement made in good faith by a Christian of their religious belief that unrepentant sinners will go to hell may constitute a statement of belief. However, a statement made in good faith by that same person that all people of a particular race will go to hell may not constitute a statement of belief as it may not reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of Christianity.[4]

However, such a statement is inconsistent with an explanation provided elsewhere in the explanatory notes that the definition of 'religious belief' is intended to not protect religions as a 'whole', such as Christianity or Islam, but rather is intended to protect the beliefs and activities

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[3] Clause 5(1) of the Bill now includes an alternative definition of 'statement of belief': where a good-faith statement is made by a person who does *not* hold a religious belief and this statement 'is of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief'. This means that a non-religious statement of belief will only be captured by clause 42 where the *motivation* behind the statement was the individual's *absence of religious beliefs*. As such, all statements covered by clause 42 must still, in some way, relate to religious beliefs. For instance, a statement that 'single mothers are evil for depriving their child of a father' could be protected by clause 42 if either: (i) it is made by a person who has religious beliefs, and the belief that single mothers are evil is *in accordance with their religious beliefs*; or (2) it is made by a person who does not have religious beliefs, and the belief that single mothers are evil is *because of their absence of religious beliefs*. This statement would not be protected if made without regard to religion, or on the basis of any other (non-religious) beliefs or values.

[4] Explanatory Notes, Second Exposure Draft Religious Discrimination Bill 2019 (Cth) [539].

of different sects and denominations.[5] The explanatory notes also accept that new religions may emerge over time.[6] While a statement that persons of a particular race will go to hell may not be reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of Christianity *generally*, this cannot discount the possibility that such a statement *is* consistent with the genuine beliefs of different subsects or an 'emerging' religion.

Because of the wide definition given to 'statement of belief', the following scenarios that are currently unlawful acts of discrimination under various state or territory laws would likely become lawful if based on a religious belief:

- an employer telling a transgender employee that their gender identity is against the laws of God;
- a childcare provider stating to a single mother that they are evil for depriving their child of a father;
- a receptionist at a medical practice telling a person with a disability they have been given their disability by God so they can learn important lessons; and
- a waiter in a café saying they will 'pray for your sins' to a gay couple.

This will create a particularly unworkable situation for businesses in regard to employment. Work health and safety laws impose a positive duty on employers to prevent harm from bullying, harassment and discrimination,[7] and discrimination laws require businesses to provide their services free from discrimination—yet clause 42 would authorise bullying and discrimination in some circumstances. The Bill would have the normative effect of providing employers, employees and workplace participants with a near-*carte blanche* right to make such statements so long as they are based upon a religious belief. It also reduces the already-low likelihood of impacted persons lodging legitimate discrimination complaints, by introducing many levels of complexity into the legislative scheme.

While an exception is contained in clause 42(2) for statements which are malicious or which vilify others, such that those statements *can* be the subject of discrimination complaints, the scope of this exception is narrow. 'Vilify' has now been defined in clause 5 to mean 'incite hatred or violence towards the person or group', which is a far narrower definition of vilification than that adopted in any other comparable federal, state or territory law in Australia. This means that clause 42 in the second exposure draft of the Bill has an even *wider* operation in overriding federal, state and territory laws than the equivalent provision in the first exposure draft of the Bill. Because this exception departs from the terms on which there is established jurisprudence under vilification protections, it also adds a level of complexity to what must be proven by the complainant in a complaint where this defence is raised.

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5 Ibid [73].

6 Ibid [71].

7 See generally Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32(2) *Australian Journal of Labour Law* 219.

Fourth, clause 42(1)(c) is highly unusual in permitting the overriding of *any other* state and territory laws (ie, state and territory laws which are not discrimination laws, including laws that may be passed in future to respond to the needs of local communities) through regulation. An Act of Parliament would not be required to further extend this override. This is undemocratic, and is a wholly disproportionate measure that preferences religious freedom at the expense of state and territory laws designed to protect impacted communities from harm.

Fifth, the second exposure draft of the Bill and the accompanying explanatory notes highlight that it is only statements 'in and of themselves' that are protected, and that any further conduct such as refusing to provide a service to an individual is not protected by clause 42. The term 'in and of' is ill-defined, open to judicial interpretation, and unlikely to be understood by the general public. This is an inadequate measure to address previous concerns that acts of discrimination connected to discriminatory statements may be considered together by judicial decision-makers under clause 42 and both the statement *and* the conduct be shielded from any discrimination claim; the explanatory notes are not the substantive law, the law will be given meaning by judicial interpretation, and it remains open to a party to argue for an interpretation of 'statement' that encompasses conduct.

The amendments made since the first exposure draft of the Bill also fail to address the issue that organisational policies are, arguably, 'statements' and, as such, discriminatory policies could be protected under clause 42.

4.2 Procedural difficulties with override of state and territory laws

There are also significant procedural issues with a federal defence applying to state- or territory-based discrimination claims.[8]

The overwhelming majority of discrimination claims are made in state and territory systems, rather than the federal system, largely owing to state and territory statutory authorities having a local presence and state and territory tribunals operating on a 'no costs' basis in the area of discrimination law. As such, a state or territory tribunal will not make an order requiring the unsuccessful party to pay the successful party's legal costs, other than in exceptional circumstances.

However, state and territory tribunals are not Chapter III courts under the *Commonwealth Constitution* and cannot exercise federal jurisdiction.[9] A matter will involve the exercise of federal jurisdiction if a party has a defence that owes its existence to a law of the federal

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8 As noted in Simeon Beckett, 'Key protection in religious discrimination bill is fatally flawed', *The Sydney Morning Herald* (online at 18 September 2019) <https://www.smh.com.au/national/key-protection-in-religious-discrimination-bill-is-fatally-flawed-20190917-p52s3n.html>.

9 *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254; *Burns v Corbett* [2018] HCA 15. See, eg, *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, [239] (Kenny J) (determining that the Anti-Discrimination Tribunal of Tasmania was not a Chapter III Court).

Parliament.[10] The High Court of Australia thereby held in *Burns v Corbett* in 2018 that a state tribunal cannot exercise juridical power in a complaint of discrimination across a state border.[11]

Clause 42 of the Bill provides a federal defence to a complaint of unlawful discrimination made under state or territory discrimination laws. This defence is a federal question of law that would involve the exercise of federal jurisdiction. As such, it is unlikely that state and territory tribunals will be able to determine this defence. Were a respondent to a state- or territory-based claim of unlawful discrimination to raise this defence in a state or territory tribunal, it seems that only a Chapter III court could adjudicate the defence. It is difficult to ascertain how these issues would then be practically resolved by a Chapter III court if the clause 42 defence was raised in a discrimination case in a state/territory tribunal—as above, the uniqueness of clause 42 in overriding state and territory laws makes this entirely new legal territory—but the three most likely outcomes are all problematic:

1. Notwithstanding the jurisdictional issues identified above, the tribunal contends that it has jurisdiction and adjudicates the defence in any case, and is then subject to an appeal to a Chapter III court which overturns this finding and rules the tribunal had no such jurisdiction to adjudicate the defence;
2. The tribunal accepts they do not have jurisdiction to adjudicate the defence, and remits the defence to be raised in separate proceedings in the relevant state or territory Supreme Court, or the Federal Court of Australia, for adjudication; while this occurs, the state or territory tribunal would not be able to determine the substantive complaint of discrimination; or
3. The tribunal accepts they do not have jurisdiction to adjudicate any aspect of the matter, as the raising of a federal defence with potential for section 109 inconsistency under the *Commonwealth Constitution* may render the entire matter a federal question of law that requires the exercise of federal jurisdiction, and remits the entire case to be raised in separate proceedings in the relevant state or territory Supreme Court, or the Federal Court of Australia, for adjudication.

In each of these three scenarios, both applicants and respondents will face substantially higher costs, lengthy delays, and significant procedural barriers in resolving the relevant claim of discrimination. This is despite the fact that state and territory discrimination claims are intended to proceed more quickly and cheaply than other claims owing to the tribunals that hear these claims. As a result, whatever the outcome in these cases, clause 42 would significantly undermine the practical and procedural adjudication of discrimination law complaints under state and territory laws.[12] It will also potentially increase demands on, and caseloads of, state and

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10 *Sunol v Collier* [2012] NSWCA 14, [7] (Leeming JA), citing *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 581; *Felton v Mulligan* (1971) 124 CLR 367, 373; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

11 [2018] HCA 15.

12 With perhaps one exception: Part 3A of the *Civil and Administrative Tribunal Act 2013* (NSW) was introduced in late 2018 to resolve the issue that arose in *Burns v Corbett* [2018] HCA 15, thereby allowing for the transfer of proceedings to the Local Court or District Court in New South Wales where a federal issue

territory Supreme Courts and the Federal Court of Australia, increasing litigation costs for claimants, respondents and the justice system as a whole.

On any remaining matters regarding these procedural difficulties, we endorse the relevant section of the previous submission made to this consultation by the Law Council of Australia on 3 October 2019.[13]

Recommendation 1: Clause 42 be removed.

has arisen. However, this will still require the commencement of separate proceedings for the raising of this clause 42 defence.

13 Law Council of Australia, *Submissions on Religious Discrimination Bill Exposure Draft* (2 October 2019) <https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/submissions/Law%20Council%20of%20Australia.pdf> 51–54.

5. Prohibition of indirect discrimination: Clause 8

5.1 EMPLOYER CONDUCT RULES AND QUALIFYING BODY RULES

Clause 8(1) prohibits indirect discrimination on the basis of religious belief or activity, reflecting the structure of other federal discrimination laws by defining indirect discrimination as the imposition of a condition, requirement or practice which has, or is likely to have, the effect of disadvantaging persons who possess the protected attribute (in this case, a particular religious belief or activity). Clause 8(1)(c) also reflects the structure of other federal discrimination laws by providing a 'reasonableness' defence to indirect discrimination. As in other federal discrimination laws,[14] 'reasonableness' is assessed in clause 8(2) by reference to a set of balancing factors that weigh the different and competing interests of the relevant parties: the nature and extent of any disadvantage resulting from the condition, requirement or practice; the feasibility of overcoming or mitigating this disadvantage; and the proportionality of this disadvantage to the result sought by the person who imposed the condition, requirement or practice. This is similar to proportionality exercises undertaken to balance and resolve competing human rights under international law.

Under these provisions, and these provisions alone, indirect discrimination under this Bill would work in the same way as it does under other discrimination laws in Australia. Consider the example of a law firm which imposes a requirement that all employees must work between 9am and 1pm on Sundays. This might *prima facie* disadvantage those of a religious faith which requires or expects observance of that faith and/or attendance at religious ceremonies and events on Sundays. This may not be a disadvantage that can be overcome or mitigated, and it may be unclear why a law firm would require work to be completed in those hours when courts are not open on Sundays and clients are less likely to be working at that time. As such, it may be that this requirement is found to be unreasonable, and therefore unlawful indirect discrimination. The situation may be different for employers with stronger justifications for requiring work to be conducted on weekends, such as real estate agencies. The advantage of the general 'reasonableness' test and associated balancing factors is that individual circumstances of the relevant parties can be taken into account and weighed against each other in coming to a decision on whether the condition, requirement or practice in question amounts to indirect discrimination.

However, clauses 8(2)(d), (3) and (5) of the Bill effectively circumvent and override this general 'reasonableness' defence and the associated balancing factors used to assess 'reasonableness'. These clauses provide that an employer conduct rule that would restrict or prevent the expression of religious beliefs at a time other than in the course of an employee's employment will be presumed 'unreasonable' for 'relevant employers' (those with an annual revenue over $50 million), unless it would cause unjustifiable financial hardship or the statement is malicious or would vilify a person or group. This has the effect of creating a legal presumption that 'employer conduct rules' are unlawful indirect discrimination, rather than assessing this through

[14] See, eg, *Sex Discrimination Act 1984* (Cth) s 7B(2).

the balancing factors used to assess 'reasonableness' under all other indirect discrimination claims under Australian discrimination laws.

This type of provision (either one on 'employer conduct rules' or one providing a general presumption of unreasonableness) is not found in *any* other Australian discrimination law, which adequately address the issue through ordinary indirect discrimination provisions (including the 'reasonableness' defence and associated balancing factors). While these 'employer conduct rule' provisions clearly target an Israel Folau-type situation, this situation can already be, and is more appropriately, captured by the ordinary indirect discrimination provisions in clauses 8(1) and (2) without requiring additional special provisions. Instead, the current situation under the Bill is that where an employer imposes a rule that restricts the expression of religious beliefs, this would be unlawful indirect discrimination unless the employer can prove one of two exceptions (which are difficult to establish, and discussed below). The obligation on employers to ensure a healthy and safe work environment has already been referred to in Part 4 above, and this obligation should not be undermined by a new and novel framing that makes the employer's capacity to fulfil this obligation more difficult.

Under clauses 8(2)(d), (3) and (5), statements on the basis of religious belief would have greater protection from employer intervention than a statement made for any other reason. For employers, it would mean that measures to protect their reputation through codes of conduct would need to be applied differently in respect of employees making statements on the basis of religious belief and employees making statements on some other basis, such as a social, cultural, political, scientific, or considered belief.

For example, a 'relevant employer' might impose a rule that bans employees from engaging publicly in controversial political debates. If a gay employee is restricted by this rule from publicly supporting marriage equality as a result, they could argue an indirect discrimination case under the SDA, but the rule will be lawful if the employer can establish that the rule was 'reasonable' based on the balancing factors. Differently, a religious employee in the same situation (for instance, an employee restricted from publicly opposing marriage equality on the basis of their religious beliefs) could argue an indirect discrimination case under the proposed Religious Discrimination Act, and the rule would be *presumed* unlawful unless the employer can prove one of two exceptions made available. These exceptions require an employer to prove that the employer conduct rule is 'necessary' to avoid unjustifiable financial hardship (clause 8(3)), or that the statement made by the employee is malicious or would, or be likely to, harass, threaten, seriously intimidate or vilify another person or group (clause 8(5)). Both exceptions set very high standards of proof, which are much harder to prove than the general standard of 'reasonableness' found in all other federal indirect discrimination prohibitions. As such, an employer is unlikely to be able to establish either of these exceptions in most cases.

The Bill's presumption of unreasonableness in indirect discrimination claims has also, in clauses 8(2)(e) and (4) of the second exposure draft of the Bill, now been extended to qualifying body conduct rules. 'Qualifying bodies' include legal admission boards, medical boards, universities and TAFEs, among other bodies. For the reasons given above, this is both

unnecessary and objectionable for providing unique protection to members of qualifying bodies who express religious views, and not any other views.

As a matter of equality, there should not be one rule for indirect discrimination on the basis of race, sex, disability and age, and another rule for indirect discrimination on the basis of religion. Employer conduct rules should be considered under the same 'reasonableness' test in all federal discrimination laws.

As clause 32(6) refers to employer conduct rules in assessing inherent requirements, this should also be removed if the employer conduct rule provisions in clause 8 are removed.

Recommendation 2: Clauses 8(2)(d), (2)(e), (3), (4) and (5) and 32(6) be removed.

5.2 HEALTH PRACTITIONER CONDUCT RULES

Clauses 8(6) and (7) provide that rules that require health practitioners to provide a health service to which they object on the basis of a religious belief or activity are *presumed to be unreasonable*, and are therefore acts of unlawful indirect discrimination. These provisions pertain to rules imposed by health service providers, or any other individuals who are able to impose rules of conduct on health practitioners.

The breadth of these provisions could allow health practitioners to lawfully refuse to provide a range of health services, including women's reproductive health services, reproductive health services for people with disabilities, transgender health services, and other services for LGBTIQ+ patients. This limitation could also apply to any treatments that involve the use of certain animal by-products, stem cells or treatments that had, at a research stage, involved stem cells where the use of such products or procedures are in conflict with a health practitioner's religious beliefs. While the definition of 'health services' in clause 5 has been narrowed since the first exposure draft, the definition still includes the vast majority of essential health services in Australia.

Clauses 8(6) and (7) are unique in the federal discrimination law landscape, and indeed in discrimination law across Australia. This 'protection' for the religious sensitivities of health practitioners would only exist on the basis of religious belief or activity, and no other attribute. This gives an unprincipled privilege to one protected attribute (religious belief or activity) over all others, and creates an objectionable hierarchy in discrimination protection in Australia. The effect is that a health practitioner who opposes abortion on the basis of a religious belief could claim unlawful discrimination if an employer or health services provider required them to provide abortion-related services, while a health practitioner who opposes abortion on the basis of a personal non-religious belief could not.

A consequence of this provision is that organisations that provide health services will, in some circumstances, be forced to engage in unlawful discrimination. For instance, an individual pharmacist working at a pharmacy could refuse to provide 'puberty blocker' medication to a transgender customer on the basis of their own religious beliefs, despite being asked to provide them to transgender people by the pharmacy owner. Assuming the individual pharmacist is

captured by clause 8(7), which appears likely, this would mean the pharmacy owner would face an impossible choice: require the pharmacist to provide the prescribed medication to the transgender customer and be subject to a religious discrimination claim by the pharmacist; or allow the pharmacist to refuse to provide the prescribed medication to the transgender customer and be subject to a gender identity discrimination claim by the customer under the SDA. This is an unconscionable burden for legislation to impose on business owners and health professionals with ethical obligations to those seeking medical help, and is a wholly disproportionate measure to protect religious freedom. One fundamental tenet of the rule of law is that laws need to be drafted so that people are able to comply with them; this Bill, in some cases, would not allow organisations to comply with legal obligations to both their workers and to their customers.

In another example a rural town may have one general practitioner, who refuses to discuss or perform certain reproductive health services for a patient, for example prescribing the morning-after pill, and refuses to refer the patient to another doctor. Although some state or territory laws may require the doctor to refer them onwards, the effect of clauses 8(6) and (7) could be to override those provisions. In any case, there may be limited referral options in the particular rural area, leaving the patient without recourse. On a practical level, clauses 8(6) and (7) signal to health practitioners that they are protected in such circumstances. Existing legal requirements that protect the rights of patients—including, for example, the *Australian Charter of Healthcare Rights*—could be undermined and subject to challenge.

Although exceptions are provided in clauses 8(7)(a) and (b), these set very high standards of proof: requiring that the rule in question is necessary to avoid an 'unjustifiable adverse impact' on either: (a) the ability of the person imposing the rule to provide the health service; or (b) on the health of any person who would otherwise be provided with that health service. The use of both 'necessary' and 'unjustifiable' standards means that health service providers are unlikely to meet either of these exceptions in most cases.

The clarifications that have been added to clauses 8(6) and (7), such that health practitioners are only permitted to object to particular *procedures* rather than particular *patients* or *groups of patients*, have been added as legislative notes, which for reasons noted below in Part 7.7 is inadequate. Even if the clarifications were in the legislation, as they ought be, in some instances it is impossible to separate a particular procedure from a particular group of patients; only transgender patients are likely to undertake sex reassignment procedures or seek access to puberty blocking medications, while women will predominantly affected by refusals to provide female reproductive health procedures. Indeed, the new drafting of clauses 8(6) and (7) may even encourage health practitioners to implement blanket bans on certain procedures, rather than holding more nuanced or principled positions, since blanket bans are more likely to be lawful under these provisions. A health practitioner refusing to prescribe contraception to *all* customers is more likely to be protected by clauses 8(6) and (7) than a health practitioner only refusing to prescribe contraception to single women.

As such, this clarification does not significantly change the above objections to clauses 8(6) and (7), nor does it change, for instance, the outcome of the pharmacy example given above.

These provisions remain deeply problematic for the reasons given. Further, these provisions are not found in any other Australian discrimination law.

Clause 32(7) refers to health practitioner conduct rules in assessing inherent requirements; this should also be removed if the health practitioner conduct rule provisions in clause 8 are removed.

Recommendation 3: Clauses 8(6) and (7) and 32(7) be removed.

6. Religious body exceptions: Clause 11

6.1 TEST FOR RELIGIOUS BODY EXCEPTION

Clause 11 of the Bill provides that a religious body does not discriminate under *any provision of the Bill* if they engage either:

- 'in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion': clause 11(1); *or*
- 'in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body': clause 11(3).

This would allow religious bodies to discriminate against people of other religious beliefs or faiths, or against people of no religious beliefs or faith.

Only one of the above tests needs to be met in order for the conduct to be lawful under the Bill. Clause 11(1) is unorthodox, extremely wide in scope, and far easier to satisfy than *any* religious body exception test found in *any* other federal, state or territory discrimination law in Australia. This significantly undermines the purpose of the Bill—to prohibit religious discrimination—by providing a much wider exception than seen in other comparable discrimination laws.

Clause 11(1) will, in effect, allow a religious body to escape liability for an otherwise unlawful act of religious discrimination where they can establish that *a single person* of the same religion as the body *could reasonably consider* the act to be in accordance with the beliefs of that religion. The religious body would not be required to establish any recognised religious or doctrinal basis for its act—even in relation to adducing evidence from a single individual adherent of the same faith. The religious body would not be required to establish that the individual agreed the act was in accordance with the beliefs of that religion. Rather, the religious body would only need to establish that an individual—*any* individual—might consider the act, reasonably, to be in accordance with the beliefs of that religion. The bar set by this test is so low as to be entirely ineffective. It is difficult, if not impossible, to imagine an act by a religious body which would *not* fall within the scope of clause 11(1), and therefore be excluded from the operation of the Bill.

Clause 11(3) adds an alternative test which religious bodies can satisfy in order to be excepted from the Bill. However, despite the assertion in the 'summary of amendments' document (released with the Bill) that the addition of clause 11(3) in the second exposure draft of the Bill 'aligns with existing provisions in the … SDA', clause 11(3) provides a weaker test than the relevant SDA test. While section 37(1)(d) of the SDA provides an exception where conduct 'is necessary to avoid injury to the religious susceptibilities of adherents of that religion', clause 11(3) omits that the conduct be 'necessary'. Rather, the conduct must only, in fact, be 'to avoid injury to the religious susceptibilities of adherents'. This, again, lowers the bar of this test significantly; it is misleading to suggest this test 'aligns' with existing SDA provisions.

As religious discrimination is not currently prohibited by federal law, it may be suggested that the effect of clauses 11(1) and (3) is simply to continue the status quo for religious bodies, such that conduct they currently engage in lawfully will remain lawful if this Bill becomes law. This ignores the operation of existing protections against discrimination on the ground of religion in all state and territory discrimination laws (except for New South Wales and South Australia). Were clauses 11(1) and (3) in their current form to become law, there could be a potential argument under section 109 of the *Commonwealth Constitution* that state and territory laws which do not provide as wide an exception for religious bodies would be rendered invalid to the extent they are inconsistent with clauses 11(1) and (3). This would have the effect of rendering lawful a far wider range of conduct by religious bodies than is currently deemed unlawful under state and territory laws. As most discrimination claims proceed to state and territory authorities, this could significantly weaken existing protection for individuals against religious discrimination. Further, even if this were not the case, to exclude such a significant array of conduct from the operation of this Bill would undermine and frustrate the very purpose of the Bill: *to prohibit religious discrimination*. The Bill may, in its current form, permit more discrimination than it prohibits.

Equivalent religious body exceptions at the federal, state and territory level require that conduct 'conforms to' religious doctrine or 'is necessary to avoid injury to' religious susceptibilities.[15] The test provided in this Bill should be amended to reflect the equivalent standards set by other Australian discrimination laws. There is no principled basis on which a far lower standard should be set for religious bodies in this Bill, nor for weakening the standard set by other Australian discrimination laws, which still allow some religious activities to be excepted from prohibitions on discrimination in recognition of a religious body's right to exercise their religious freedom in relation to core activities and doctrine.

Setting a lower standard in this Bill could also provide a precedent for the Australian Law Reform Commission (**ALRC**), in its current inquiry on religious exceptions, to recommend the same lower standard be adopted in other federal discrimination laws.[16] Indeed, the President of the ALRC noted in Senate Estimates in October 2019 that, 'what we've been asked to do [now] is restrict ourselves to a drafting exercise which would ensure that the Sex Discrimination Act and the Fair Work Act were consistent with the government's bill.'[17] If the SDA and *Fair Work*

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15 Sex Discrimination Act 1984 (Cth) s 37(1)(d); Age Discrimination Act 2004 (Cth) s 35. No such religious exceptions exist in the Racial Discrimination Act 1975 (Cth) or the Disability Discrimination Act 1992 (Cth). On state laws, see, eg, Anti-Discrimination Act 1977 (NSW) s 56(d); Anti-Discrimination Act 1998 (Tas) s 52(d).

16 Attorney-General for Australia, The Hon. Christian Porter MP, *Review into the Framework of Religious Exemptions in Anti discrimination Legislation* (Media Release, 10 April 2019) <https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>;

17 Parliament of Australia, *Senate Legal and Constitutional Affairs Legislation Committee: Estimates*, 'Attorney-General's Portfolio: Australian Law Reform Commission' (22 October 2019) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Festimate%2F2d5584b3-e781-4bb0-8723-

Act 2009 (Cth) were to be amended to adopt the tests in clauses 11(1) and (3), to thereby make them 'consistent' with the Bill, this would significantly weaken existing protections on the basis of sex, pregnancy, sexual orientation, gender identity, intersex status and other attributes, and would provide religious bodies a vastly wider scope than currently exists to discriminate on those grounds.

Recommendation 4: Clause 11(1) be amended to read: 'A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that conforms to the doctrines, tenets, beliefs or teachings of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.'

Recommendation 5: Clause 11(3) be removed.

6.2 DEFINITION OF 'RELIGIOUS BODY'

The definition of 'religious body' in clause 11(5) of the Bill has been expanded to now include registered benevolent institutions conducted in accordance with religious beliefs, as well as religious educational institutions and any other body conducted in accordance with religious beliefs.

As per the explanatory notes,[18] the purpose of the inclusion of registered public benevolent institutions is because such bodies have a main purpose of 'relieving poverty or distress'. Such a purpose is described by the explanatory notes as 'commonly inspired by religious faith.' Registered public benevolent institutions are captured by clause 11 even where they engage solely or primarily in commercial activities; no principled basis has been provided as to why this should be the case.

Other religious charities continue to be covered by the Bill through clause 11(5)(c), so long as they are 'conducted in accordance with a particular religion'. Thus, such organisations will be religious charities even if their purposes are 'advancing health or advancing social or public welfare'. Various Australian charities that provide a vast array of public services and benefits would be caught by this definition. Clause 11 would allow them to discriminate widely, in ways that non-religious charities could not. This would exacerbate what is already an uneven playing field in the various industries and markets in which not-for-profit organisations compete. This is made more problematic by the inclusion of registered public benevolent bodies, as this now includes an even wider array of important organisations that provide various public goods and services.

Take for example a soup kitchen affiliated to one particular religion. Clause 11 would allow the soup kitchen to require that *any* volunteer helping serve bowls of soup is of the same religion. It would also allow the soup kitchen to refuse to serve soup to any persons who are of a different

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18 Explanatory Notes, Second Exposure Draft Religious Discrimination Bill 2019 (Cth) [221]–[222].

religious faith, or of no religious faith, or to require recipients to participate in religious activities in order to receive food. Similarly, a homeless shelter could refuse to provide shelter to a person who did not have the same religious beliefs.

Religiously affiliated charities and public benevolent institutions are already captured by other relevant exceptions in the Bill: the governing rules of charities, and conduct engaged in to give effect to such rules, are excepted under clause 29; and religious discrimination is permitted in employment where, because of religious belief or lack thereof, a person is unable to carry out the inherent requirements of the job under clause 32(2). The latter would also allow religious charities and public benevolent institutions to employ applicants of the same faith for roles in which faith is relevant: for instance, leadership roles.

While there may be a basis for the clause 11 exception for those charities that are expressly established for a religious purpose, there appears to be no basis for extending this exception to charities or public benevolent institutions with a religious affiliation or connection, where their main purpose is to provide public goods, services or facilities such as food or shelter.

Equivalent religious body exceptions in other federal discrimination laws apply only to 'bodies established for religious purposes'.[19] This Bill should be amended along similar lines. Organisations that engage solely or primarily in commercial activities should not be granted a *carte blanche* exception from the operation of this Bill solely by reason of having a connection with a particular religion.

While hospitals, aged-care facilities and accommodation providers have now been explicitly excluded from clause 11, their separate inclusion in clause 32 is dealt with in Part 6.4 below.

Recommendation 6: Clauses 11(5)(b) and (c) be removed, and replaced with: 'any other body established for religious purposes (other than a body that engages solely or primarily in commercial activities)'.

6.3 SCOPE OF RELIGIOUS SCHOOL EXCEPTION

The clause 11(5)(a) exclusion applies to all conduct engaged in by religious educational institutions. For instance, a student may join a religious school in Year 1 and at the time be of the school's faith. Halfway through Year 12, that student may decide they do not identify strongly with that religion anymore. Clauses 11(1) and (5)(a) would allow the school to expel that student on the basis that they do not share the same religious beliefs as the school. By contrast, equivalent provisions in Tasmanian, Queensland, Northern Territory and Australian Capital Territory laws allow schools to discriminate on the ground of religion at the time of admission—ie, their first enrolment at that school—but not once a student is a member of the school community.[20]

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19 *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Age Discrimination Act 2004* (Cth) s 35.

20 *Anti-Discrimination Act 1998* (Tas) ss 51A(2), (3); *Anti-Discrimination Act 1991* (Qld) s 41(a); *Discrimination Act 1991* (ACT) s 46; *Anti-Discrimination Act 1992* (NT) s 30(2).

Religiously affiliated educational institutions are already dealt with by other relevant exceptions in the Bill: for example, religious discrimination is permitted in employment where, because of religious belief or lack thereof, a person is unable to carry out the inherent requirements of the job under clause 32(2). This would already allow religious schools to employ applicants of the same faith for roles in which faith is relevant. To the extent that religious schools are permitted to preference students of the same faith, this should only apply at the stage of admission and not at any later stage, owing to the disproportionate adverse effect this will have on students in later years of schooling as they develop their own sense of identity. As such, clause 11 should be amended to ensure the religious school exception applies only at the stage of admission. This can be done by drawing on clause 19 of the Bill, which already separates the prohibition on discrimination in education into: (i) the stage of admission to the school in clause 19(1); and (ii) post-admission in clause 19(2). Clause 11 should not apply to clause 19(2), thereby maintaining the prohibition on post-admission discrimination against students.

Clause 11(6) provides that '[t]his section applies despite anything else in this Act'. This is unnecessary if the intention is to ensure that conduct captured by clause 11 is *not* unlawful discrimination under the Bill; clauses 11(1) and (3), and our amendment in Recommendation 4, already provide that '[a] religious body does not *discriminate* against a person under this Act by…'. This is all that is necessary for such conduct to be excepted from the prohibitions on discrimination contained in the Bill. Instead, clause 11(6) should be replaced with a provision to the effect that clause 11 is subject to clause 19(2), such that post-admission religious discrimination against students by religious schools is not permissible.

Clauses 11(1) and (3) have been clarified so that they do not permit conduct that is otherwise unlawful under any other federal law, including the SDA. This partially rectifies concerns previously raised that clause 11(5)(a) could be used to exclude LGBTIQ+ students from religious schools on the basis that LGBTIQ+ students may not be not acting in accordance with the beliefs of their particular school/s. However this should also be made clear through any amendments that result from the current ALRC inquiry into religious educational institution exceptions contained in the SDA.[21] One key term of reference for that review is the consideration of what reforms should be made in order to 'limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos'.[22] The federal government has repeatedly stated publicly that it wants to, and will, remove existing exemptions that allow religious schools to expel gay students.[23] Steps must be taken to ensure this Bill does not confer any separate right on religious schools to effectively discriminate against students on

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21 Attorney-General for Australia, The Hon Christian Porter MP, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation* (Media Release, 10 April 2019) <https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>; see *Sex Discrimination Act 1984* (Cth) s 38.

22 Ibid.

23 Paul Karp, 'Scott Morrison will change the law to ban religious schools expelling gay students', *The Guardian* (online at 13 October 2018) <https://www.theguardian.com/australia-news/2018/oct/13/morrison-caves-to-labor-on-gay-students-in-discrimination-law-reform-push>.

the basis of their sexual orientation or gender identity. Not only would this defeat the purpose of the outcomes of the ALRC inquiry, this would create procedural difficulties where an applicant lodges a discrimination claim under the SDA and the respondent raises a defence under a separate federal discrimination law (the proposed Religious Discrimination Act). This would create a conflict between two federal laws which can only be resolved judicially at the expense of parties to a complaint.

Recommendation 7: Clause 11(6) be removed, and replaced with: 'Nothing in this section affects the operation of section 19(2) of this Act.'

6.4 RELIGIOUS HOSPITALS, AGED-CARE FACILITIES AND ACCOMMODATION PROVIDERS

A separate exception has been added to the second exposure draft of the Bill in clause 32(8) and (10), allowing religious hospitals, aged-care facilities and accommodation providers to discriminate on the basis of religious belief or activity in employment. The tests provided in clauses 32(8) and (10) are the same tests found in clauses 11(1) and (3), requiring a very low standard of proof. This could allow, for instance, a religious hospital to sack a doctor who expresses pro-choice views; it could allow a religious aged-care facility to refuse to hire an atheist care worker.

There is no rational basis for requiring doctors, aged-care workers or employees at accommodation providers to express the same religious beliefs and practices as the religion to which their employer is associated. The requirement is an unwarranted limitation on freedom of speech, opinion and belief. These are organisations primarily conducted for commercial purposes or for health- or welfare-related purposes. They should not be subject to special exceptions. Healthcare and accommodation should be provided by those individuals who are best equipped to provide it, on the basis of merit. Where religious beliefs or activity are relevant in particular roles at religious hospitals, aged-care facilities and accommodation providers, they will already be covered by the inherent requirements exception in clause 32(2) such that these organisations can discriminate on the basis of religious belief or activity. Where they are not relevant, they should be subject to the same prohibition on religious discrimination as non-religious hospitals, aged care facilities and accommodation providers.

Recommendation 8: Clauses 32(8) and (10) be removed; in the alternative, clauses 32(8) and (10) be amended to meet the test found in Recommendation 4.

6.5 RELIGIOUS CAMPS AND CONFERENCE SITES

Similarly, a separate exception has been added to the second exposure draft of the Bill in clause 33(2) and (4), allowing religious camps and conference sites to discriminate on the basis of religious belief or activity in the provision of accommodation. The tests provided in clauses 33(2) and (4) are the same tests found in clauses 11(1) and (3), requiring a very low standard of proof. This could allow, for instance, a for-profit camp or conference site to refuse to hire the facilities to a healthcare conference on female reproductive health, or for an LGBTIQ youth suicide prevention camp. One difference with this exception is the requirement for conduct

to be ‘in accordance with a publicly available policy issued by the [relevant] person’: clauses 33(2)(c) and (4)(c).

For the same reasons as noted in Part 6.4 above, it is unclear why accommodation at commercially operated religious camps and conference sites needs to be provided only to those who express the same religious beliefs and practices as the religion with which the camp or conference site is associated.

Recommendation 9: Clauses 33(2) and (4) be removed; in the alternative, clauses 33(2) and (4) be amended to meet the test found in Recommendation 4.

7. Other matters

7.1 Extension of Bill to bodies corporate

We endorse fully the previous submission made to this consultation by the Australian Human Rights Commission (**AHRC**) on 27 September 2019 in regard to concerns over the extension of this Bill to allow bodies corporate to bring claims of religious discrimination.[24]

Owing to the inability of bodies corporate to be characterised in a manner pertaining to sex, race, age or disability, all existing federal discrimination laws allow only natural persons to bring a claim of discrimination. This is the case without requiring specific definitions of 'person' in those laws, owing solely to the limited character that organisations can take. However, bodies corporate can indeed be characterised in a 'religious' manner. With the previous definition of 'person' in clause 5 to include bodies corporate being removed in the second exposure draft of the Bill, 'person' then falls to be defined by the *Acts Interpretation Act 1901* (Cth) owing to statutory interpretation principles. Section 2C of that Act establishes that any reference to 'person' in a federal Act 'include[s] a body politic or corporate as well as an individual.' Because clauses 7 and 8 of the Bill provide that a person can discriminate against 'another person', this means that religious bodies corporate and other bodies with a religious character *can* bring claims for religious discrimination under the Bill. This is also expressly acknowledged in the explanatory notes: 'the Act does not preclude bodies corporate or other non-natural persons from being "persons aggrieved" for the purposes of the AHRC Act in appropriate cases.'[25] As such, the removal of 'person' from clause 5 has no operative effect, and further definitions must be included to clarify that only natural persons can make discrimination complaints.

Human rights are expressly designed to protect innately *human* characteristics. While bodies corporate and other organisations should, consistent with other federal discrimination laws, be prohibited from *engaging in* discriminatory conduct, such bodies should not be permitted to themselves *bring a claim of* discrimination.

Recommendation 10: A definition of 'aggrieved person' be added to clause 5 to mean natural persons, and clauses 7 and 8 (*substantive prohibition clauses*) be amended to read: 'A person *discriminates* against another person (*'aggrieved person'*)…'.

7.2 Extension of prohibition on discrimination to associates

Clause 9 of the second exposure draft of the Bill extends the existing prohibition on discrimination to associates. This is a not uncommon protection in discrimination laws, and is contained in near-identical language in the DDA,[26] and in different language in the *Racial*

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24 Australian Human Rights Commission, *Religious Freedom Bills: Submission to the Attorney-General's Department* (27 September 2019) <https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-bills> 15–18.

25 Explanatory Notes, Second Exposure Draft Religious Discrimination Bill 2019 (Cth) [64]–[66].

26 *Disability Discrimination Act 1992* (Cth) s 7.

Discrimination Act 1975 (Cth) (**RDA**).[27] Based on the examples given in the explanatory notes,[28] this brings the provision into line with established drafting of discrimination laws. However, several clarifications should be made.

Firstly, 'associate' is not defined in the Bill; the only guidance provided is in clause 9 itself, providing that an association can be 'as a near relative or otherwise'. This is vague and will lead to confusion. The DDA represents best practice in defining 'associates' to include spouses, persons living together on a genuine domestic basis, relatives, carers, and persons in business, sporting or recreational relationships.[29] This definition should be adopted in the Bill.

Second, for the reasons explained in Part 7.1 above, the Bill currently permits bodies corporate and other organisations to bring claims of discrimination. The recommendation in Part 7.1 does not address associates. As such, clause 9 should also be clarified to ensure bodies corporate and other organisations cannot bring claims of discrimination owing to an association with a natural person.

Third, the SDA and *Age Discrimination Act 2004* (Cth) (**ADA**) currently do not extend the prohibition on discrimination to associates. If the Bill is to contain such a prohibition, then similar amendments should be made to the SDA and ADA to the same effect. There is no principled basis on which discrimination in relation to associates should be prohibited on the basis of religious belief or activity, but not age, sex, or the other grounds enumerated in the SDA.

Recommendation 11: 'Association' be defined in clause 5 in identical language to the definition of 'associate' found in section 4(1) of the *Disability Discrimination Act 1992* (Cth), and the phrase '(whether as a near relative or otherwise)' be removed from clause 9.

Recommendation 12: Clause 9 (*discrimination against associates*) be amended to read: 'This Act applies to a person ('*aggrieved person*') who has an association with a person…'.

Recommendation 13: The *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth) be amended to include similar protection for associates as per the test found in Recommendation 11.

7.3 ACCESSIBILITY OF CONSULTATION

We are aware of a number of concerns that have been raised concerning the accessibility of the consultation process generally, and in particular for people with disabilities, people from culturally and linguistically diverse backgrounds, and people with literacy difficulties, many of whom are personally affected by discrimination. These concerns include lack of time, lack of clear explanatory materials, lack of accessible format materials for people with cognitive impairments or limited English language reading skills (including audio format materials), and lack of opportunity to speak and be heard. These shortcomings have excluded people with

27 *Racial Discrimination Act 1975* (Cth) ss 5, 11–15.

28 Explanatory Notes, Second Exposure Draft Religious Discrimination Bill 2019 (Cth) [195].

29 *Disability Discrimination Act 1992* (Cth) s 4(1).

disability and others from this consultation process and, as a result, made the process discriminatory on the basis of, at least, race, age, disability and family responsibilities. This requires an extension of time and the adoption of established law reform processes, in order to ensure fair and non-discriminatory participation.

Recommendation 14: Further time be allowed, and proper process adopted, for consultation on the Religious Discrimination Bill 2019 (Cth) and the related religious freedom Bills to allow fair and non-discriminatory participation.

7.4 AMENDMENT OF 'OBJECTS' CLAUSES

The Human Rights Legislation Amendment (Freedom of Religion) Bill amends the objects clauses of all four federal discrimination laws to include reference to the importance of 'all' human rights. The explanatory notes provide that this will ensure freedom of religion, among other rights, is given appropriate regard in discrimination law.[30] Clause 3(2)(a) of the second exposure draft of the Religious Discrimination Bill also now includes reference to all human rights having equal status in international law. These changes are not necessary and have no substantive effect.

At present only the SDA, of the federal suite of discrimination laws, refers to giving effect to a United Nations (UN) convention in its objects, although some of the other federal discrimination laws refer to UN conventions for the purposes of establishing constitutional power to legislate. The aims and purpose of clause 3(2) of the Bill are unclear, and its effect will be to cause confusion in statutory interpretation.

The ICCPR, relied upon as a constitutional basis of the Bill in clause 58(a), makes it clear in article 18 that the right to manifest religion can be limited in order to secure the rights of others; the non-discrimination rights in articles 2 and 26 cannot be limited in that way. The Bill is inconsistent in relying on international conventions, but then departing from their formulations in matters of substance and the balancing of competing rights.

In *Maloney v The Queen*,[31] the High Court of Australia held that in so far as the RDA referred to the *International Convention on the Elimination of All Forms of Racial Discrimination*, the meaning of its provisions was taken to be as at the date of Australia's ratification in 1975. This raises further questions about what the references to international human rights law in clause 3(2), and subsequent amendments to the other federal discrimination laws, might mean.

Further, the significant step of including an objects clause in the other four federal discrimination laws should not be accomplished by a secondary piece of legislation in this way. It should be the subject of adequate primary consultation. The rationale given in the explanatory notes for this inclusion has nothing to do with race, sex, disability or age discrimination law and is concerned

30 Explanatory Notes, Second Exposure Draft Religious Discrimination Bill 2019 [52]–[55].

31 *Maloney v The Queen* (2013) 352 CLR 168.

only with religious freedom. It fails to consider what if any might be the impact on the other four federal discrimination laws of adopting this clause.

Recommendation 15: Clause 3(2) be removed, and the objects clauses of the four existing federal discrimination laws not be amended to include reference to all human rights having equal status under international law.

7.5 PREFERENCING BY RELIGIOUS BODIES

The second exposure draft of the Bill, in clauses 11(2) and (4), 32(9) and (11), and 33(3) and (5) expressly clarifies that a religious body is permitted to give preference to persons of the same religion as the religious body.

This is unnecessary: the scope of clause 11 already permits such preferencing through excepting a religious body from all prohibitions on discrimination contained in the Bill. This is done through positive language, and would be the same if the clause 11 test were to be modified to meet the SDA test as recommended. Including clauses 11(2) and (4) and 32(9) and (11) only serves to further complicate an already complex Bill.

Recommendation 16: Clauses 11(2) and (4), 32(9) and (11), and 33(3) and (5) be removed.

7.6 OVERRIDING OF LOCAL GOVERNMENT BY-LAWS

The second exposure draft of the Bill includes a new clause 5(2) which provides that an activity is not unlawful merely because a local government by-law prohibits the activity. This is unorthodox, and would mean that local government by-laws that prevent or restrict religious activities can be susceptible to challenge. This would have the effect of overriding existing legal protections and privileging one protected attribute (religious belief or activity) over others. For instance, street preachers denied permits by local government authorities could sue for religious discrimination, even if their religious activities would contravene local by-laws with which all other individuals and groups must comply. Local governments may also be unable to impose existing noise restrictions on noise caused by religious observance or ceremonies.[32]

Recommendation 17: Clause 5(2) be removed.

7.7 USE OF LEGISLATIVE NOTES AND EXAMPLES

The second exposure draft of the Bill uses a vast array of legislative notes and examples to make substantive legal comments and clarifications. There are two main issues with this. Firstly, this drafting renders the Bill more complex and confusing at a time when plain English drafting is recognised as necessary to ensure public access to the laws that bind and protect them. Second, legislative notes do not have the same weight in interpreting statutes as do substantive provisions;

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[32] See, eg, Tony Moore, 'Gold Coast council recommends mosque, rejects 4am prayer time', *Brisbane Times* (online at 10 September 2014) <https://www.brisbanetimes.com.au/national/queensland/gold-coast-council-recommends-mosque-rejects-4am-prayer-time-20140910-10exx5.html> .

they are not considered to be 'part of' an Act, and therefore are accorded far less interpretive weight.[33] Therefore key clarifications, such as the religious body exceptions not altering the lawfulness of conduct under the SDA, may not be given effect by judicial decision-makers when interpreting this Bill. Legislative notes providing real-life examples should remain as legislative notes.

Recommendation 18: Legislative notes and examples that make substantive legal comments and clarifications be converted into substantive provisions in the Bill.

[33] See *Acts Interpretation Act 1901* (Cth) ss 13(3)(a), 15AB.